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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRISH McEVOY LTD., Plaintiff, - against - TOO FACED COSMETICS, LLC, Defendant.	Case No.: 16-cv-7549 ECF Case **COMPLAINT** (JURY TRIAL DEMANDED) (REQUEST FOR INJUNCTIVE RELIEF)

Plaintiff Trish McEvoy Ltd. ("Trish McEvoy" or "Plaintiff"), by their attorneys, MontaguLaw, P.C., as and for its Complaint against Defendant Too Faced Cosmetics, LLC ("Too Faced" or "Defendant"), alleges as follows:

NATURE OF THE ACTION

1. This is a civil action for damages and injunctive relief for trademark infringement, dilution and unfair competition, under the Lanham Act, 15 U.S.C. § 1051, *et seq*., and under New York common law. As alleged more fully below, Defendant Too Faced has infringed Plaintiff Trish McEvoy's THE POWER OF MAKEUP trademark.

2. As a result of Defendant's willful, wrongful, and unlawful conduct, Trish McEvoy seeks an injunction, damages and other monetary relief against Defendant, including but not limited to treble damages, attorneys' fees, costs and pre- and post-judgment interest.

PARTIES

3. Plaintiff Trish McEvoy Ltd. is a corporation organized and existing under the laws of the State of New York, with its principal place of business located at 800A Fifth Avenue, New York, New York 10021.

4. Defendant Too Faced Cosmetics, LLC is a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business located at 18231 McDurmott West, Suite 100, Irvine, California 92614.

JURISDICTION AND VENUE

5. Jurisdiction is proper in this Court pursuant to the Lanham Act, 15 U.S.C. § 1121, and 28 U.S.C. §§ 1331 and 1338. This Court has supplemental jurisdiction over the common-law claims pursuant to 28 U.S.C. § 1367.

6. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 and because a substantial part of the events giving rise to this action occurred in this District.

FACTUAL BACKGROUND

7. Trish McEvoy is a well-known provider of high-quality cosmetics goods, products and services. Through extensive advertising, marketing and the sale of those goods, products and services, under its trademarks throughout the United States and around the world for more than 25 years, Trish McEvoy has built up – at considerable expense and effort – valuable goodwill and reputation, as symbolized by its trademarks. As a result, Trish McEvoy's trademarks have become well known to consumers as designations of the source of its goods, products and services.

8. Trish McEvoy is the owner of the following United States Trademark Registration for its THE POWER OF MAKEUP Mark:

Mark	**Filing Date**	**Reg. No.**	**Goods/Services**
THE POWER OF MAKEUP	March 18, 2008	3399333	Cosmetics, namely, foundation, blush, pressed powder, under eye cover, eye shadow, eye liner, lip gloss, and lipstick (Class 3). Cosmetic containers sold empty, namely, compacts for foundation, blush, pressed powder, under eye cover, eye shadow, eye liner, lip gloss, and lipstick (Class 21).

A copy of the Certificate of Registration for this Mark is attached hereto as Exhibit A.

9. Trish McEvoy uses its THE POWER OF MAKEUP Mark in connection with certain of its extensive offering of cosmetics goods and products. In fact, Trish McEvoy has invested considerable sums in promoting its THE POWER OF MAKEUP Mark and has continuously used its Mark in commerce in connection with its cosmetics goods and products, since at least as early as June 1, 2004. Examples of Trish McEvoy's use of its THE POWER OF MAKEUP Mark are attached hereto as Exhibit B.

10. Trish McEvoy's THE POWER OF MAKEUP Mark has become, and now is, famous and is closely and universally associated with Trish McEvoy and its goods and products and as a means by which Trish McEvoy and its goods and products have become known to the public and by which the source and origin of Trish McEvoy's goods and products are identified.

11. Trish McEvoy's fame and notoriety are well established. The goods and products that Trish McEvoy offers for sale under THE POWER OF MAKEUP Mark are known for the high quality associated with Trish McEvoy's name and reputation.

12. Defendant sells cosmetics goods, products and services in direct competition with Trish McEvoy.

13. Upon information and belief, Defendant has been using the designation "THE POWER OF MAKEUP" in connection with the advertising, marketing and sale of its cosmetics goods, products and/or services, since at least June 2016.

14. Defendant made no use of the designation "THE POWER OF MAKEUP" prior to the date upon which Trish McEvoy began using its THE POWER OF MAKEUP Mark.

15. As demonstrated in Exhibit C, Defendant is prominently using the designation "THE POWER OF MAKEUP" on its website. What's more, upon information and belief, Defendant is also prominently using the designation "THE POWER OF MAKEUP" in various manners, including on signs, advertisements and other marketing materials.

16. The acts and conduct of Defendant, complained of herein, are likely to cause confusion or to cause mistake or to deceive persons into the erroneous belief that Defendant's goods, products and/or services, marked with the designation "THE POWER OF MAKEUP," are Trish McEvoy's goods, products and/or services, or that Defendant or its goods, products and/or services, marked with the designation "THE POWER OF MAKEUP," are authorized by Trish McEvoy or are endorsed by Trish McEvoy or are sponsored by Trish McEvoy or are connected in some way with Trish McEvoy or the goods and/or products associated with Trish McEvoy's THE POWER OF MAKEUP Mark.

17. The acts and conduct of Defendant, complained of herein, were deliberate and intentional and designed to create confusion or mistake or to deceive persons into the erroneous belief that Defendant's good, products and/or services, marked with the designation "THE POWER OF MAKEUP," are Trish McEvoy's goods, products and/or services or that Defendant

or its goods, products and/or services, marked with the designation "THE POWER OF MAKEUP," are are authorized by Trish McEvoy or are endorsed by Trish McEvoy or are sponsored by Trish McEvoy or are connected in some way with Trish McEvoy or the goods and/or products associated with Trish McEvoy's THE POWER OF MAKEUP Mark.

18. Defendant's use of the designation "THE POWER OF MAKEUP" falsely designates the origin of Defendant's goods, products and/or services and constitutes false descriptions and representations to the effect that Defendant's goods, products and/or services, marked with the designation "THE POWER OF MAKEUP," are Trish McEvoy's goods, products and/or services or that Defendant or its goods, products and/or services, marked with the designation "THE POWER OF MAKEUP," are authorized by Trish McEvoy or are endorsed by Trish McEvoy or are sponsored by Trish McEvoy or are connected in some way with Trish McEvoy or Trish McEvoy's goods and products associated with its THE POWER OF MAKEUP Mark, and Defendant, with knowledge of such falsity, has caused its goods, products and services to enter into commerce.

19. Trish McEvoy is, or is likely to be, damaged by Defendant's false designations, descriptions and representations because the public and the trade are likely to be induced into purchasing Defendant's goods, products and/or services, marked with the designation "THE POWER OF MAKEUP," in the mistaken belief that they are Trish McEvoy's goods, products and/or services or that Defendant or Defendant's goods, products and/or services, marked with the designation "THE POWER OF MAKEUP," are authorized by Trish McEvoy or are endorsed by Trish McEvoy or are sponsored by Trish McEvoy or are connected in some way with Trish McEvoy or the goods and/or products associated with Trish McEvoy's THE POWER OF MAKEUP Mark.

20. Defendant's use of the designation "THE POWER OF MAKEUP" for goods, products and/or services in the cosmetics field will dilute the distinctive quality of Trish McEvoy's famous THE POWER OF MAKEUP Mark.

21. Defendant's adoption of the designation "THE POWER OF MAKEUP" was deliberate and intentional and designed to dilute the distinctive quality of Trish McEvoy's famous THE POWER OF MAKEUP Mark and to trade on the goodwill and reputation associated therewith.

22. Defendant's use of the designation "THE POWER OF MAKEUP" is without Trish McEvoy's license, authorization or permission.

23. The acts and conduct of Defendant complained of herein have irreparably damaged Trish McEvoy and, unless restrained, will impair, if not destroy, the value of Trish McEvoy's THE POWER OF MAKEUP Mark and the goodwill associated therewith, and Trish McEvoy has no adequate remedy at law.

24. In letters, dated August 17 and September 8, 2016, Trish McEvoy's counsel informed Defendant of Trish McEvoy's use of and rights in its THE POWER OF MAKEUP Mark and that Defendant's use of the designation "THE POWER OF MAKEUP" for goods, products and/or services in the cosmetics field violates Trish McEvoy's rights and is highly likely to cause confusion among consumers. Trish McEvoy's counsel further demanded that Defendant: (i) cease and desist from all use of Trish McEvoy's THE POWER OF MAKEUP Mark; (ii) remove and destroy or re-label all existing products and marketing materials bearing Trish McEvoy's THE POWER OF MAKEUP Mark; (iii) instruct all retailers that carry Defendant's merchandise to remove immediately from sale and to return all existing products

and marketing materials bearing Trish McEvoy's THE POWER OF MAKEUP Mark; and (iv) provide written confirmation that Defendant has complied with the foregoing demands.

25. In a letter, dated September 12, 2016, Defendant's counsel responded to Trish McEvoy's counsel's August 17 letter, claiming erroneously that: (i) Trish McEvoy has not used its THE POWER OF MAKEUP Mark; and (ii) Defendant's use of the designation "THE POWER OF MAKEUP" for goods, products and/or services in the cosmetics field does not violate Trish McEvoy's rights. For the reasons set forth herein, Defendant's counsel's claims are without merit.

26. In a letter, dated September 15, 2016, Trish McEvoy's counsel responded to Defendant's counsel's September 12 letter, explaining that: (i) Defendant's contention that Trish McEvoy is not using its THE POWER OF MAKEUP Mark is inaccurate; (ii) there is no basis upon which any claim for trademark abandonment could be supported; and (iii) Defendant's use of Trish McEvoy's THE POWER OF MAKEUP Mark "is a textbook example of trademark infringement."

FIRST CAUSE OF ACTION
(Federal Trademark Infringement Under 15 U.S.C. §§ 1114 and 1125(a))

27. Plaintiff repeats and re-alleges the allegations of Paragraph 1 through 26 hereof, as if set forth fully herein.

28. The acts and conduct of Defendant, complained of herein, constitute willful trademark infringement in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1).

SECOND CAUSE OF ACTION
(Unfair Competition Under 15 U.S.C. § 1125(a))

29. Plaintiff repeats and re-alleges the allegations of Paragraph 1 through 28 hereof, as if set forth fully herein.

30. The acts and conduct of Defendant, complained of herein, constitute willful violations of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

THIRD CAUSE OF ACTION
(Federal Trademark Dilution Under 15 U.S.C. § 43(c))

31. Plaintiff repeats and re-alleges the allegations of Paragraph 1 through 30 hereof, as if set forth fully herein.

32. The acts and conduct of Defendant, complained of herein, constitute willful trademark dilution in violation of Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c).

FOURTH CAUSE OF ACTION
(State-Law Trademark Infringement Under N.Y. Gen. Bus. Law § 368-e)

33. Plaintiff repeats and re-alleges the allegations of Paragraph 1 through 32 hereof, as if set forth fully herein.

34. The acts and conduct of Defendant, complained of herein, constitute willful trademark infringement under N.Y. Gen. Bus. Law §368-e.

FIFTH CAUSE OF ACTION
(State-Law Trademark Dilution Under N.Y. Gen. Bus. Law § 368-d)

35. Plaintiff repeats and re-alleges the allegations of Paragraph 1 through 34 hereof, as if set forth fully herein.

36. The acts and conduct of Defendant, complained of herein, constitute trademark dilution in violation of the New York Anti-Dilution Statute, N.Y. Gen. Bus. Law §368-d.

SIXTH CAUSE OF ACTION
(Unfair Competition)

37. Plaintiff repeats and re-alleges the allegations of Paragraph 1 through 36 hereof, as if set forth fully herein.

38. Defendant's use in commerce of Plaintiff's THE POWER OF MAKEUP Mark, as alleged herein, constitutes unfair competition under New York law.

39. Defendant's conduct exceeds the bounds of fairness and commercial morality, and Plaintiff has been damaged by such conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Trish McEvoy Ltd. respectfully requests that the Court enter judgment on the Complaint against Defendant Too Faced Cosmetics, LLC:

A. Enjoining and restraining, preliminarily and permanently, Defendant, its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with any of them, from using in connection with the advertising, offering for sale, sale or distribution of goods, products or services in the cosmetics field, the designation "THE POWER OF MAKEUP," or any other mark or name that is likely to cause confusion or mistake or to deceive persons into the erroneous belief that Defendant's goods, products and/or services are Plaintiff's goods, products and/or services or that Defendant or its goods, products and/or services are authorized by Plaintiff or are endorsed by Plaintiff or are sponsored by Plaintiff or are connected in some way with Plaintiff or Plaintiff's goods, products and/or services associated with Plaintiff's THE POWER OF MAKEUP Mark;

B. Enjoining and restraining, preliminarily and permanently, Defendant, its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with any of them, from using any false designation of origin or false description or representation or from engaging in any act or series of acts which, either alone or in combination, constitutes deceptive or unfair methods of competition by Defendant with Plaintiff or from otherwise interfering with or injuring Plaintiff's business reputation or diluting the distinctive quality of Plaintiff's THE POWER OF MAKEUP Mark, or the goodwill associated therewith;

C. Ordering that all advertisements, pamphlets, brochures, catalogs, labels, signs, prints, packages, wrappers, and products in Defendant's possession, custody or control that display the designation "THE POWER OF MAKEUP," be delivered up and destroyed as the Court shall direct;

D. Awarding to Plaintiff Defendant's profits and Plaintiff's damages caused by Defendant's acts of infringement, dilution and unfair competition complained of herein;

E. Awarding to Plaintiff three (3) times the amount of damages caused by Defendant's willful acts of infringement, dilution and unfair competition complained of herein;

F. Awarding to Plaintiff punitive damages arising out of Defendant's willful acts of infringement, dilution and unfair competition complained of herein;

G. Awarding to Plaintiff its costs and disbursements, including reasonable attorneys' fees; and

H. Granting such other and further relief as the Court deems just, proper and equitable.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38, Plaintiff demands a jury trial on all issues triable of right by a jury.

Dated: New York, New York
September 27, 2016

MONTAGULAW, P.C.

By: ______________________
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